Supreme Court, U.S.
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Nos. 98-926 and 98-1018

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LOWER TULE RIVER IRRIGATION DISTRICT, *et al.*,
Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

CHOWCHILLA WATER DISTRICT and
MADERA IRRIGATION DISTRICT,
Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

FRED H. ALTSHULER
MICHAEL RUBIN
MICHAEL W. GRAF
MICHAEL E. WALL
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
Counsel for Respondent Natural Resources Defense Counsel

CYNTHIA L. KOEHLER
1150 Clayton Street
San Francisco, CA 94117
(415) 626-6847
Counsel for Respondents

HAMILTON CANDEE *
Natural Resource Defense Council
71 Stevenson Street, Suite 1825
San Francisco, CA 94105
(415) 777-0220
Counsel for Respondents Natural Resources Defense Council, et al.

PHILIP F. ATKINS-PATTENSON
SHEPPARD, MULLIN, RICHTER & HAMPTON
Four Embarcadero Center
17th Floor
San Francisco, CA 94111
(415) 434-9100
Counsel for Respondents

* *Counsel of Record*

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QUESTIONS PRESENTED

1. Whether section 3406(c)(1) of the Central Valley Project Improvement Act, a federal environmental law that prohibits certain Friant Dam flow releases "as a measure to implement *this title*," facially preempts California Fish and Game Code § 5937, a pre-existing state law that requires flow releases to protect downstream fisheries.

2. Whether the Bureau of Reclamation was excused from a statutory requirement that the Bureau either consult formally with the National Marine Fisheries Service on certain water contract renewals or obtain the Service's concurrence that the renewals were unlikely to affect a protected species adversely, where the Service *refused* to give the Bureau its concurrence but stated that consultation was unnecessary at that time due to a separate ongoing consultation, which itself did not consider the renewals.

3. Whether Respondents' action to rescind certain water supply contracts, which the Bureau of Reclamation renewed before completing mandatory formal consultation with the Fish and Wildlife Service, was "mooted" by the Bureau's *ex post facto* consultation, even though the contracts continued to injure the Respondents until rescinded.

STATEMENT PURSUANT TO RULE 29.6

Respondents have no parent or nonwholly owned subsidiary companies.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

Respondents are conservation organizations and recreational and commercial fishing groups whose members experience "economic and recreational damage * * * occasioned by the drying up of the San Joaquin River below the Friant Dam."[1] In 1989, Respondents sued the Bureau

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[1] *See Natural Resources Defense Council v. Patterson*, 791 F. Supp. 1425, 1429 (E.D. Cal. 1992). Respondents are Natural Re-

of Reclamation ("Bureau") and the Secretary of the Interior (collectively, "the Government") to challenge several long-term water supply renewal contracts about to be executed by the Bureau, and petitioner irrigation districts and water user authority ("Petitioners") intervened. When the district court invalidated the contracts as violative of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and implementing regulations, Petitioners (but not the Government) appealed. The Court of Appeals unanimously rejected Petitioners' arguments (Pet. App. 1, 36),[2] and Petitioners sought this Court's review. The Government joins in some of Petitioners' merits arguments—an unsurprising position given that the Government was a defendant below, and lost—but agrees with Respondents that review by this Court is not warranted.[3]

Petitioners' Statement (Pet. 3-12) obscures or ignores several significant facts:

First, Petitioners' argument that the Bureau need not consult with the National Marine Fisheries Service (NMFS) about the Friant renewal contracts rests on the assertion that the Bureau did formally consult with

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sources Defense Council; Trout Unlimited of California; Bay Institute of San Francisco; California Natural Resources Federation; California Sportfishing Protection Alliance; California Trout; Friends of the River; Northern California Guides Association; Pacific Coast Federation of Fishermen's Associations; San Joaquin Raptor Rescue Center; Sierra Club; Stanislaus Audubon Society, Inc.; United Anglers of California; California Striped Bass Association; and National Audubon Society.

[2] Unless otherwise noted, references to "Pet. App.," "Pet.," "Reply," or "Petitioners" are to the Petition Appendix, Petition, Reply, and Petitioners in No. 98-926. The Petition in No. 98-1018 is addressed at note 15, *infra*.

[3] The Government does not join Petitioners' merits argument on preemption (Gov't Opp. 16-17) and disagrees with Petitioners on mootness (Gov't Opp. 19 & n.12).

NMFS on overall Central Valley Project ("CVP") operations in 1992. Pet. 8, 9, 24. However, the Bureau's 1992 consultation with NMFS *specifically excluded any consideration* of either the Friant renewal contracts or the direct impacts of Friant Dam operations and diversions. Pet. App. 216.

Second, Petitioners assert that the NMFS's 1992 "reasonable and prudent alternative" for CVP operations called for no changes in Friant operations or renewal contracts. Pet. 9. But the NMFS's 1992 biological opinion did not even consider whether to recommend changes to Friant operations or renewal contracts as part of an alternative to prevent jeopardy to the protected chinook salmon. Pet. App. 216, 219. Instead, NMFS developed its "reasonable and prudent alternative" through a consultation process that excluded consideration of the contracts.

Third, Petitioners' Statement ignores that, after the district court invalidated the renewal contracts, Petitioners and the Bureau executed interim replacement contracts under the CVPIA that are more protective of Respondents' environmental and other interests. New long-term replacement contracts will likely also be more protective of Respondents' interests, because the long-term replacement contracts must comply with Central Valley Project Improvement Act (CVPIA) requirements, *see, e.g.*, CVPIA §§ 3404(c), 3405 (Pet. App. 167-177), and be negotiated in light of extensive environmental reviews.

Fourth, contrary to Petitioners' implication (Pet. 4; Reply 4; No. 98-1018 Pet. 12), this litigation has never prevented Petitioners from receiving water from the Friant Unit. Gov't Opp. 18. Petitioners' assertion that the contract rescissions have significantly impacted Central Valley agriculture is wholly unsupported by the record.[4]

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[4] In addition, Petitioners' implication (Pet. 11) that Respondents never challenged the Fish and Wildlife Service ("FWS") biological

ARGUMENT

This case satisfies none of the usual criteria for granting a writ of certiorari. The questions presented are unlikely to arise often, there is no conflict among the circuits, and the decision below was correct.

1. *The Preemption Question.* Petitioners first ask this Court to construe a federal statutory provision that applies to just one dam in the country. The extreme narrowness of that question militates against granting review. Review is especially inappropriate because the courts below have not yet resolved whether the allegedly preempted state statute even *applies* to that dam under state law. Moreover, the decision below was a plainly correct application of this Court's precedent to plain statutory language, and neither the Federal government nor the State of California seeks review.

The allegedly preemptive provision of federal law is found in the Central Valley Project Improvement Act, Pub. L. No. 102-575, Title XXXIV, 106 Stat. 4706, which generally directed the Secretary of the Interior to "develop and implement a program" to sustain production of anadromous fish (such as the chinook salmon) in Central Valley rivers at twice the species' average 1967-1991 level. CVPIA § 3406(b)(1) (Pet. App. 178). However, because Congress was unsure what program should be implemented for the particular stretch of the San Joaquin River below Friant Dam, Congress deferred that question, and instead instructed the Secretary of the

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opinion is false. As explained by the Government (Gov't Opp. 19 n.11), Respondents *have* challenged the validity of the FWS biological opinion, under both the Endangered Species Act and the Administrative Procedure Act. Respondents' substantive challenge to that FWS opinion was dismissed without prejudice *only* because Respondents' other victories "offered complete relief." Pet. App. 25 n.8.

Interior to develop a plan to improve San Joaquin streamflow, riparian habitat, and water quality. CVPIA § 3406 (c)(1) (Pet. App. 191). Congress emphasized, however, that it was not yet directing the Secretary to implement any new flow-release program for that stretch, for Congress restricted the Secretary's authority to release water from the Friant Dam "*as a measure to implement this title.*" *Id.* (Pet. App. 192) (emphasis added).

In *California v. United States*, 438 U.S. 645 (1978), this Court held that, under Reclamation Act § 8, California "may impose *any* condition on the 'control, appropriation, use or distribution of water' through a federal reclamation project that is not inconsistent with clear congressional directives." *Id.* at 672 (emphasis added).[5] While CVPIA § 3406(c)(1) required the Secretary to develop a San Joaquin River restoration plan, nothing in that section's language even hinted that Congress intended to suspend the Secretary's existing legal responsibilities, particularly the Secretary's existing duties to comply with state water law. The modifying clause "as a measure to implement this title" plainly limited the surrounding text —i.e., it limited the Secretary's authority to release water from the Friant Dam to implement the CVPIA—and would have been mere surplusage if, as Petitioners con-

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[5] Section 8 of the Reclamation Act, 43 U.S.C. § 383, provides that "[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws." Petitioners concede that "purposeful and continued deference to State water law by Congress" permeates "the federal-state relationship concerning water usage." Pet. 13 (internal quote marks omitted).

tend, Congress had intended flatly to prohibit *all* release of water from Friant Dam, no matter what the statutory basis.[6]

The allegedly preempted provision of California law, Fish and Game Code § 5937, requires dam owners to "allow sufficient water" to be released from a dam "to keep in good condition any fish" downstream. Section 5937 is not a "measure to implement" the CVPIA. Indeed, section 5937 predated the CVPIA. On its face, the CVPIA does not preempt section 5937 or any other state law. If section 5937 applied to the Friant Dam before the CVPIA's enactment—a question that the court of appeals remanded to the district court to resolve in the first instance[7]—then section 5937 continued to apply

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[6] Disregarding the "duty to give effect, if possible, to every clause and word of a statute," *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (internal quote marks omitted), Petitioners never suggest a meaning for the phrase "as a measure to implement this title." Petitioners suggest only that the key phrase should be construed in light of the CVPIA's "broad" purposes. Pet. 17-18. However, there is no facial conflict between the CVPIA's purposes —e.g., "to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley," *see* CVPIA § 3402(a) (Pet. App. 162)—and California Fish and Game Code § 5937, which requires dam owners to allow sufficient water to flow over, around, or through a dam or fishway "to keep in good condition any fish that may be planted or exist below the dam."

[7] As the Government notes (Gov't Opp. 16-17), the courts below did not resolve whether § 5937 applied to the Friant Dam as a matter of state law, or if it did, whether that section would in practice interfere with CVPIA § 3406(c)(1) (Pet. App. 34). These unresolved issues counsel against review. In reply, Petitioners (Reply 8) cite several cases—*Abbott Lab. v. Gardner*, 387 U.S. 136 (1967); *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, (1985); and *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Devel. Comm'n ("PG&E")*, 461 U.S. 190 (1983)—in which this Court decided to review issues that had a "direct and immediate" impact, 387 U.S. at 152, or had "plagued" industry and "seriously hampered" implementation of federal law, 473 U.S. at

after the CVPIA's enactment.[8]

2. *The NMFS Consultation Question.* Petitioners contend (Pet. 23-24) that the courts below should have excused the Bureau from its ESA consultation obligations, despite NMFS's disagreement with the Bureau over whether the Friant renewal contracts were likely to affect chinook salmon adversely. Pet. App. 229. However, Petitioners have not suggested any split among the circuits, have not shown that the issue presented is likely to arise often, and have offered no other good reason for review.

As for the merits, the Bureau squarely violated the ESA and implementing regulations when it renewed the Friant contracts without completing formal NMFS consultation. Section 7(a)(2) of the ESA requires "[e]ach Federal agency" to consult with the NMFS or FWS to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). The implementing regulations require each federal agency to engage in "formal consultation" if "a determination is made" that "any action may affect listed species." 50 C.F.R. § 402.14(a). Formal consultation is excused *only* if "the Federal agency determines, *with the written concurrence of [NMFS or FWS]*, that the proposed action is not likely

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581, or required prompt resolution to prevent a "palpable and considerable hardship, 461 U.S. at 201-02. The present case is clearly different, as the Court here cannot know whether § 5937 will ever be applied adversely to Petitioners. *Cf. PG&E*, 461 U.S. at 203.

[8] Unable to offer any alternative explanation for the phrase "as a measure to implement this title," Petitioners argue that "[t]he legislative history of the CVPIA * * * strongly supports an interpretation that Congress intended the Act to preempt state law relating to the release of water from Friant Dam." Pet. 19. Petitioners' legislative history argument was carefully considered—and rejected—by the district court. Pet. App. 75 n.17, 77-82.

to adversely affect any listed species" (or in one other circumstance not at issue). 50 C.F.R. § 402.14(b) (emphasis added).[9] Here, of course, NMFS did not give the Bureau its "written concurrence," but rather *disagreed* with the Bureau's view that the Friant contracts were unlikely to impact winter-run chinook salmon adversely. Formal consultation was required.

Thus, the court of appeals was correct that NMFS's statement to the Bureau that consultation on the contract renewals was "not * * * necessary" at that time (Pet. App. 229, 231) did not excuse the Bureau's consultation obligation. NMFS premised its statement on the fact that the Bureau and NMFS were separately consulting on proposed overall CVP operations. Pet. App. 230. But the Bureau's consultation on the proposed overall CVP operations specifically excluded consideration of the renewal contracts (the agency action at issue here) or any direct consideration of Friant operations. Pet. App. 216. The Bureau's general CVP consultation therefore could not have satisfied the Bureau's obligation to consult formally on the Friant contracts.

Moreover, NMFS ultimately concluded that the proposed overall CVP operations were "*likely to jeopardize* the continued existence" of the winter-run chinook salmon. Pet. App. 218-19 (emphasis added). While NMFS offered the Bureau one alternative that could "be implemented by the Bureau to avoid jeopardy" (Pet. App. 219), neither NMFS nor the Bureau considered whether releases from Friant Dam (or any other changes at Friant

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[9] Similarly, the legislative history of ESA § 7 shows Congress' intent that "[i]f the Federal action agency or the Secretary determines that a proposed action may affect a listed species or its habitat, immediate consultation shall be undertaken." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 20 (Sept. 25, 1978), *reprinted in* 1978 U.S.C.C.A.N. 9470

or in the renewal contracts) should be pursued to avoid jeopardy. Pet. App. 216, 219. Of course, by the time NMFS issued its 1992 Biological Opinion, the Bureau already had renewed numerous Friant water supply contracts. The Bureau's renewal of those contracts prior to completing any formal consultation with NMFS on CVP operations violated ESA § 7(d), which specifically prohibits federal agencies from "mak[ing] *any* irreversible or irretrievable commitment of resources" that "has the effect of foreclosing the formulation or implementation of *any* reasonable and prudent alternative" until consultations are completed. 16 U.S.C. § 1536(d) (emphasis added).

Petitioners' argument rests on the false premise that "the Secretary of Commerce refuse[d] to consult" with the Bureau (Pet. i), and upon Petitioners' contention, based on that false premise, that the Bureau would have to "sue its sister agency" to persuade NMFS to consult (Pet. 23). But the Bureau never asked NMFS to engage in formal consultations on the Friant contracts. Thus, despite Petitioners' oft-repeated assertions (Pet. i, 10, 23), NMFS never "refused" to consult. Rather, the Bureau asked NMFS to concur that the Friant renewal contracts "will not affect" the chinook salmon, and NMFS *declined to concur* in that view. Pet. App. 229. NMFS also offered its advice that formal consultation was "not * * * necessary," but did not refuse to consult. In any event, as the Government itself agrees (Gov't Opp. 22), the unique factual dispute as to whether the NMFS "refused" to consult does not merit this Court's review.[10]

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[10] Petitioners also discuss an ESA § 7(d) issue (Pet. 25-27) that is not among the Petitioner's "Questions Presented." *See* Pet. i; *see also* Reply 1. Under this Court's Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." While the court of appeals' application of ESA § 7(d) may be "*related* to * * * and perhaps *complementary* to" the "Questions" as to which a writ of certiorari is sought, the

3. *The "Mootness" Question.* Petitioners contend that because consultation with the FWS on the Friant renewal contracts eventually occurred—albeit *after* the contracts were a *fait accompli*—Respondents' claim that the Bureau thereby violated the ESA is moot. Even if Petitioners were right, that issue would not merit review because the courts below had a separate and adequate basis for the relief ordered, and thus resolution of the FWS issue cannot affect the relief ordered. But Petitioners are not right: The court of appeals' decision as to FWS consultation was consistent with the decisions of other circuits and correctly applied the decisions of this Court.

First, the court of appeals (Pet. App. 21a, 23) affirmed the district court's invalidation of the Friant renewal contracts on two distinct grounds: (1) the Bureau's failure to consult in advance with the FWS and (2) the Bureau's failure *ever* to consult with NMFS. Because the mootness question arises, if at all, only as to Respondents' FWS consultation claim (Pet. i), the contracts would remain rescinded even if that claim somehow were moot (which it is not).[11]

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challenged application of ESA § 7(d) is "not 'fairly included'" in those "Questions." *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992) (emphasis in original). Even if it were—and even if, as the Petitioners contend, the court of appeals mistook the date on which ESA § 7(d) began to apply (something Respondents do not concede)—such a factual error would not warrant this Court's scrutiny. *See* Supreme Court Rule 10. And as the Government notes (Gov't Opp. 23), Petitioners cannot possibly benefit from their position that ESA § 7(d) should have applied for a *longer* period.

[11] The Petitioner's NMFS consultation issue is whether formal consultation was required *at all* on the renewal contracts, not whether that consultation belatedly occurred. Petitioners do not argue that the disagreement over NMFS consultation is moot, nor could they, since formal consultation with NMFS on the Friant contracts never took place. The Bureau's 1992 consultation with NMFS concerning overall CVP operations specifically excluded any consideration of the Friant renewal contracts.

Second, the decision below is consistent with those of other circuits. In *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) ("*SUWA*"), ESA consultation was "the only relief sought by" the plaintiff. Thus, the *SUWA* plaintiff's sole prayer for relief was satisfied once the *SUWA* defendants completed ESA consultation; there was "no point in ordering an action that has already taken place." *Id.* at 728. Here, by contrast, rescission relief was sought and attained only by order of the district court, and *SUWA* certainly does not preclude such relief, since the *SUWA* court made clear that its holding was "*not* * * * that a violation of section 7(a)(2) could always be cured by subsequent consultation." 110 F.3d at 729 (emphasis added).

In *Sierra Club v. Glickman*, 156 F.3d 606, 611 (5th Cir. 1998), the district court ordered the United States Department of Agriculture ("USDA") to consult with the FWS concerning a particular program. While USDA's appeal was pending, USDA completed ESA consultations and fully satisfied the district court's order. *Id.* The court of appeals then held that USDA's *appeal* was moot, because "the USDA clearly fulfilled whatever obligations it had as a result of the district court's order" and could obtain no relief from the appellate court. *Id.* at 619.

The present controversy simply is not like *SUWA* and *Glickman*. Respondents seek a remedy—rescission of the unlawful contracts—that was not performed until the court ordered it and that benefitted them by replacing all fourteen renewal contracts with more environmentally protective contracts under the CVPIA. The Government is thus correct that *SUWA* and *Glickman* "have no bearing on the instant case." Gov't Opp. 19 n.12.[12]

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[12] The "mootness" question in this case is wholy dissimilar from that in *Friends of the Earth v. Laidlaw Environmental Services*

Third, the decisions below correctly applied established mootness principles. Rescission of the unlawful contracts redressed Respondents' injuries by, *inter alia*, requiring the Bureau to renegotiate the contracts in light of environmental reviews and CVPIA requirements. Congress presumably believed that requiring federal agencies to complete ESA consultations before irrevocably committing resources would beneficially influence agency decisionmaking. *See* ESA § 7(d), 16 U.S.C. § 1536(d). Petitioners in fact concede that "the new contracts may contain substantially different provisions than the rescinded contracts" and that "there is no guarantee that Petitioners would receive the same amount of water under the same terms as they did under the previous contracts." Reply 4. As Petitioners' concession suggsets, neither the courts below nor any of the parties to this case have ever suggested that contract renegotiation would lead to contracts unchanged from the original.[13]

(TOC) Inc., 149 F.3d 303 (4th Cir. 1998), *petition for cert. granted*, No. 98-822 (Mar. 1, 1999). The narrow mootness issue posed by *Laidlaw* is whether, and under what circumstances, a private person who sues to enforce the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, has a cognizable interest in civil penalties payable to the Treasury, if the defendant halts its illegal pollution after the complaint is filed. 149 F.3d at 306-07. Here, by contrast, Petitioners do not presently dispute that Respondents suffer a continuing injury from the diversion of San Joaquin River water. Contract rescission redresses that injury sufficiently to satisfy the case-or-controversy requirement.

[13] The Petition contends that the court of appeals "erred in ruling that rescission * * * was the sole available remedy." Pet. 27-29. This issue, like the ESA § 7(d) issue, *see* note 10, *supra*, is not among the Petition's "Questions Presented." Pet. i; *see also* Reply 1. While the court of appeals' review of the district court's remedy may be "*related* to * * * and perhaps *complementary* to" the "Questions" as to which a writ of certiorari is sought, it is "not 'fairly included' " in the "Questions Presented." *Yee*, 503 U.S. at 537.

In any event, Petitioners' argument that the court of appeals required rescission "*automatically in all cases*" (Pet. 28; emphasis

Of course, Article III does not require Respondents to show that rescission will *necessarily* benefit them: A "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting the normal standards for redressability and immediacy." [14] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). Indeed, "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years."

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in original) ignores that court's holding. As the Government observes, the court of appeals did not "announce a per se rule." Gov't Opp. 18. Rather, it stated that the district court "had *discretion* to preserve the contracts if the procedural flaw could have been rectified in another way," but that "there is no reason to compel that result here." Pet. App. 25-26. The court of appeals therefore held that "the district court's decision to rescind the contracts was not an abuse of discretion." Pet. App. 26. Petitioners offer no reason for this Court to revisit a fact-specific, abuse-of-discretion inquiry.

[14] There appears to be no present dispute that Respondents have both a procedural right under the ESA, *see, e.g., Bennett v. Spear*, 117 S. Ct. 1154, 1162-63 (1997); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180-81 (1978), and a concrete and cognizable interest in the terms of the Friant contracts, *see, e.g., Spear*, 117 S. Ct. at 1162-63 (holding that the ESA citizen suit provision expanded standing "to the full extent permitted under Article III"); *Natural Resources Defense Council v. Patterson*, 791 F. Supp. 1425 (E.D. Cal. 1992) (noting Respondents' allegations that their members "earn their living from the San Joaquin River and its environs and engage in recreational activites on the river" and have suffered "economic and recreational damage * * * occasioned by the drying up of the San Joaquin River below the Friant Dam resulting from the Bureau's delivery of water pursuant to the original contracts"). Moreover, Respondents' interest in the outcome of the case need not fit within any particular statutory "zone of interest." *See Spear*, 117 S. Ct. at 1162-63.

Id. The courts below correctly determined (Pet. App. 24-25, 123) that invalidation of the renewal contracts would benefit Respondents sufficiently to satisfy Article III.[15]

CONCLUSION

For the reasons stated above, the petitions for writs of certiorari should be denied.

Respectfully submitted,

FRED H. ALTSHULER
MICHAEL RUBIN
MICHAEL W. GRAF
MICHAEL E. WALL
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
Counsel for Respondent Natural Resources Defense Counsel

CYNTHIA L. KOEHLER
1150 Clayton Street
San Francisco, CA 94117
(415) 626-6847
Counsel for Respondents

April 15, 1999

HAMILTON CANDEE *
Natural Resource Defense Council
71 Stevenson Street, Suite 1825
San Francisco, CA 94105
(415) 777-0220
Counsel for Respondents Natural Resources Defense Council, et al.

PHILIP F. ATKINS-PATTENSON
SHEPPARD, MULLIN, RICHTER & HAMPTON
Four Embarcadero Center
17th Floor
San Francisco, CA 94111
(415) 434-9100
Counsel for Respondents

* *Counsel of Record*

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[15] Petitioners in the separate Petition No. 98-1018 also raise *sui generis* contract issues and a question concerning the date on which a particular contract became effective. No. 98-1018 Pet. 2. Those questions turn on facts concededly "unique" (No. 98-1018 Pet. 13) to those Petitioners and with no general significance; they were properly addressed by the court of appeals (Pet. App. 26-30), and do not merit the attention of this Court. Moreover, as the court of appeals noted (Pet. App. 29), a prior case already decided that Madera and Chowchilla are not exempt from the ESA. *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1405-06 (9th Cir.), *cert. denied*, 510 U.S. 813 (1993).